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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001273-MR

TIMONTE HARRIS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 01-CR-01202

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The Appellant, Timonte Harris, appeals the Fayette Circuit Court's June 5, 2008, order denying his motions made pursuant to CR 60.02 and RCr 10.26. After a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

Harris was convicted of wanton murder on June 12, 2002, following a jury trial, for which he was sentenced to thirty years in prison. Harris appealed to the Kentucky Supreme Court as a matter of right, and his conviction was affirmed by the Supreme Court on June 25, 2004.[1] We adopt and incorporate herein the statement of facts set forth by the Supreme Court in its opinion:

> At approximately 8:30 p.m. on September 15, 2001, Jeffrey ("Eenie") Reed was shot to death while driving a white Oldsmobile Achieva belonging to the mother of his cousin, Tyson Fee. Fee was a passenger in the vehicle when the shooting occurred. Fee testified that another vehicle pulled behind them as they drove down Merino Street in Lexington and that someone in that vehicle began shooting at them. Fee attempted to return fire with his .357 magnum Smith & Wesson revolver, but was unsuccessful because there was no cartridge in the chamber. Reed was shot in the back but was able to stop and exit the vehicle before collapsing in the street. Fee drove to 710 Pine Street, the home of another cousin, and hid his revolver and car keys under a mattress. He then directed his cousin to call the police to report Reed's death. Because of darkness, Fee was unable to identify the vehicle from which the shots were fired or to recognize anyone in the vehicle. Two eyewitnesses testified that the shots came from a black vehicle chasing a white vehicle and that there appeared to be three people in the black vehicle. Appellant had access to a black Honda belonging to his mother.
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> One of the eyewitnesses, however, described the black vehicle as a two-door car with gold rims whereas other evidence indicated that the black Honda owned by Appellant's mother was a four-door car without gold rims.
>
> The Commonwealth's theory was that Appellant shot Reed as part of a cycle of revenge and retaliation between Reed and Fee on one side and Appellant and

[1] *See Harris v. Commonwealth*, 134 S.W.3d 603 (Ky. 2004).

Dewan Mulazim on the other. Mulazim once described Appellant to the police as his "buddy" and "partner". In support of its theory, the Commonwealth first proved that on August 15, 2001, Reed and Mulazim were involved in an argument during which Reed knocked Mulazim to the ground and Mulazim retaliated by shooting Reed in the leg. Reed's girlfriend testified that on the night of September 14, 2001, Reed and Fee were at her apartment when they spotted Mulazim and Appellant in the neighborhood. She heard someone say, "Go get a gun," following which Reed and Fee left her residence. Shortly thereafter, she heard gunshots in the vicinity. Fee testified that on September 15th, he and Reed were parked in the white Oldsmobile when Appellant approached them on foot. Appellant accused Reed of shooting at him the previous evening. When Appellant reached in his pants as if to draw a gun, Reed started the vehicle, and he and Fee sped away.

Reed's cousin, Jeremiah Sullivan, testified that he encountered Appellant on the night of the shooting and that Appellant was waiving a .9mm Glock pistol, saying "I just got one of 'em!' Appellant told Sullivan that "I rode on 'em...Eenie and Tyson, chased 'em down," explaining that they had shot at him the previous night because he was with Mualzim, who had previously shot Reed. Appellant continued to exclaim, "Well, man, I got 'em dog, I got 'em. I know I done hit one of them. They tried to kill me." Appellant described how he had driven up behind their vehicle while holding his gun in front of the windshield and shooting.

When police interviewed Mulazim on September 17, 2002, he denied being with Appellant on either the night of the 14th or the night of the 15th but revealed that a man nicknamed "Mal Viddy," whom he identified as a brother of Brian Brown, was driving the vehicle from which the shots that killed Reed were fired. The jury could have reasonably concluded that the three people the eyewitnesses observed in the black car were Appellant, Mulazim, and Horace ("Mal Viddy") Brown (who testified that he was not with Appellant when Reed was killed). At trial, Mulazim testified that he had "made

> up" the story about 'Mal Viddy'," but admitted that he had shot Reed on August 15th and that someone had shot at him and Appellant on the night of September 14th.
>
> The police found three bullet holes in Fee's white Oldsmobile. The fatal bullet passed through the license plate holder, the trunk, the rear seat, the driver's seat, and Reed's body. The bullet was not found, but the police discovered six .9mm casings at the crime scene. Neither was the murder weapon found, but a ballistics expert testified that all six casings were fired from the same Glock .9mm pistol. The medical examiner who performed the autopsy testified that he entrance wound of the bullet into Reed's body was consistent with a wound caused by a medium-sized bullet, such as a .9mm bullet.

Harris v. Commonwealth, 134 S.W.3d 603, 605-07 (Ky. 2004).

Subsequent to the Supreme Court's affirmation of his conviction, Harris filed a *pro se* motion to vacate his conviction pursuant to RCr 11.42. Harris also moved for appointment of counsel and for an evidentiary hearing. On September 23, 2004, the court below entered an order appointing the Department of Public Advocacy (DPA) to represent Harris, and directing the DPA to file any supplemental motions within sixty days from the entry of the order.

Thereafter, on April 1, 2005, appointed counsel filed a supplement to Harris' RCr 11.42 motion pursuant to the court's directive. The court below ultimately denied Harris's RCr 11.42 motion on September 12, 2005. This Court affirmed that denial on July 23, 2007. Thereafter, on December 19, 2007, Harris filed his CR 60.02 and RCr 10.26 motion with the trial court.

In that motion, Harris contended that he was entitled to extraordinary relief under CR 60.02 and RCr 10.26 because he was denied due process during his

trial. Specifically, Harris asserted that that Commonwealth failed to qualify their expert witnesses concerning ballistics; that he was denied the assistance of a defense expert witness; that Jeremiah Sullivan attempted to influence and impede the testimony of the Commonwealth's witnesses; that Jeremiah Sullivan perjured his testimony, and that the truth or falsity of Sullivan's statements were not explored by the court through a hearing; and finally, that the court denied evidence of his actual innocence.

The trial court entered the aforementioned order denying Harris's motion on June 5, 2008. In denying that motion, the court found that Harris's contentions, even if true, were not appropriate considerations for extraordinary relief under CR 60.02, nor did they rise to the level of manifest injustice under RCr 10.26. It is from that denial that Harris now appeals, pro se, to this Court.[2]

In response to the appeal filed by Harris, the Commonwealth asserts that Harris's motion is barred because it was not filed within a reasonable time as required by CR 60.02, and that additionally, all of the issues he raises were or could have been raised via direct appeal or through Harris's RCr 11.42 motion. Accordingly, the Commonwealth asserts that Harris is barred from raising them now. Finally, the Commonwealth asserts that all of Harris's arguments are void of merit and should be denied.

[2] We note that the DPA moved to withdraw from appointment of counsel for purposes of this appeal. In so doing, the DPA stated that it had reviewed the record in the case and had determined that this "post-conviction proceeding ... is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." This Court sustained that motion and ordered Harris to file a pro se brief if he wished to proceed with the appeal.

At the outset, we note that our standard of review for a trial court's denial of a CR 60.02 motion is abuse of discretion. *Fortney v. Mahan,* 302 S.W.2d 842, 843 (Ky. 1957). The test for abuse of discretion is whether the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). We review this matter in light of the foregoing.

As the trial court correctly noted, CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or an RCr 11.42 proceeding. *See McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). Indeed, as RCr 11.42(3) makes clear, the movant shall state all grounds for holding the sentence invalid of which the movant has knowledge. Thus, final disposition of a movant's RCr 11.42 motion shall conclude all issues which could reasonably have been presented in the same proceeding. *See Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

Harris brings this appeal pursuant to CR 60.02(e)[3] and (f), and RCr 10.26. CR 60.02 provides as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than

[3] We note that although Harris identifies CR 60.02(e) as a ground for relief, he makes no argument that the judgment is void. Therefore, we shall consider this ground as being waived for purposes of this appeal, and shall not address it further herein.

> perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Further, RCr 10.26 provides that:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

As his first basis for appeal, Harris contends that the trial court erred in failing to appoint counsel, and in denying his request for an evidentiary hearing. For reasons set forth herein below, we disagree.

The law in our Commonwealth clearly establishes that there is no right to appointed counsel for a proceeding on a Rule 60.02 motion to vacate a final judgment of conviction. *See Gross, supra*, 648 S.W.2d 853 (Ky. 1983). Further, in light of our affirmation of the trial court on the following issues, we are of the opinion that an evidentiary hearing was not warranted in the matter *sub judice*, as all issues could adequately be decided from a review of the record.

As his second basis for appeal, Harris asserts that the Commonwealth failed to properly qualify the witnesses who testified concerning ballistics issues as

experts. A review of the record does indeed reveal that the witnesses with whom Harris takes issue, particularly Dr. Greg Davis, KSP forensic scientist Zenobia Skinner, and KSP firearms examiner Warren Mitchell, were not properly qualified as experts by counsel. However, the record further reveals that no objection was raised to the expert testimony at trial by Harris's counsel.

In addressing this issue, the court below noted that if Harris's counsel raised an objection then it would have required the Commonwealth to introduce the qualification and training of those experts. Regardless, the court held that it is more likely than not that the trial court would have accepted the testimony of the experts, and qualified them to testify as such.

Indeed, in the arguments which he presents to this Court, Harris makes no assertion that the court would have, or even should have, excluded the testimony of these witnesses altogether. Furthermore, the court found that Harris failed to demonstrate that qualifying these witnesses specifically concerning the ballistics issue would have been reasonably certain to cause a different result in his trial.

In reviewing the findings of the trial court in this regard, it is the opinion of this Court that this issue was one of which Harris was no doubt aware at the time he filed his motion pursuant to RCr 11.42, and of which he was aware at the time that he appealed his conviction as a matter of right to our Supreme Court. Indeed, as our Supreme Court previously stated in *Howard v. Commonwealth*, 364 S.W.2d 809,810 (Ky. 1963):

> It has long been the policy of this court that errors occurring during the trial should be corrected on *direct* appeal, and the grounds set forth under the various subsections of CR 60.02 deal with *extraordinary* situations which do not as a rule appear during the progress of a trial. Although the rule does permit a direct attack by motion where the judgment is voidable-as distinguished from a void judgment-this direct attack is *limited to specific subsections* set out in said rule ..." (emphasis added).

Further, as previously noted, and as RCr 11.42(3) makes clear, the movant shall state all grounds for holding the sentence invalid of which the movant has knowledge. Thus, final disposition of a movant's RCr 11.42 motion shall conclude all issues which could reasonably have been presented in the same proceeding. *See Gross, supra*.

In reviewing Harris's contentions concerning the qualification of the expert witnesses, we are of the opinion that this issue was one of which Harris was, or at the very least, should have been aware at the time he appealed to the Supreme Court, and at the time he filed his motion pursuant to RCr 11.42. Accordingly, we are of the opinion that he is procedurally barred from raising it now in a CR 60.02 motion. As to Harris's attempts to create an avenue of relief by basing his CR 60.02 motion on RCr 10.26 grounds, this is improper and discussed more fully *infra*. Accordingly, we affirm the trial court's dismissal of Harris's arguments on this issue.

As his second basis for appeal, Harris argues that he was not afforded an expert witness in his defense, whom he presumes would have clarified what he

claims was conflicting and inconclusive testimony regarding ballistics issues. In reviewing this argument, the court below found that Harris failed to explain, with reasonable certainty, how having such a defense expert would have changed the result of his trial. Accordingly, the court dismissed Harris's argument on this ground.

In reviewing the record, we note that this issue was one which Harris raised in the supplemental motion filed as part of his prior appeal on a RCr 11.42 motion. As previously stated, the final disposition of a movant's RCr 11.42 motion shall conclude all issues which were or reasonably could have been presented in that proceeding. As the court had previously dismissed Harris's arguments concerning this issue in disposing of the prior RCr 11.42 motion, this Court is compelled to affirm.

As his third basis for appeal, Harris argues that Jeremiah Sullivan attempted to influence witness testimony. In support of his assertion in this regard, Harris attaches an affidavit from one Nakia Bailey, dated December 13, 2007, in which she alleges that she heard Sullivan trying to persuade another witness, Susan Back, to testify that she saw Harris shoot the victim. Apparently, Back declined to do so, stating that she did not see Harris shoot the gun.

With respect to this argument, the court below again found that Harris did not state with reasonable certainty how this information, even if true, would have changed the result in his case. Further, the court noted that this information

was known to Harris at the time it happened, and accordingly, should have been raised either on direct appeal, or in his 11.42 motion for post-judgment relief.

In reviewing the record, we are again compelled to agree with the trial court on this issue.[4] If in fact this information was known to Harris at the time of trial, it is one which he should have raised via direct appeal, or in his RCr 11.42 proceeding. In the alternative, if this affidavit contains newly discovered evidence, it is an argument more properly made pursuant to CR 60.02(b), and one which, accordingly, must have been brought no more than one year following the judgment. As Harris did not do so, we again affirm.[5]

As his fourth basis of appeal, Harris asserts that he was convicted on the basis of the "perjured" testimony of Jeremiah Sullivan, and that as a result, he was denied due process. The court below also found this argument to be without merit. In so finding, the court noted that the issue below was whether Jeremiah Sullivan had spoken with Tyson Fee (the passenger of the vehicle being driven by the deceased) before Sullivan was interviewed by police.

In addressing this issue, the court below noted that the jury had an opportunity to hear the testimony of Sullivan, subject to cross-examination, as well as Sullivan's statement to police regarding any conversations he had with Fee. The

[4] Regardless of our affirmation in this regard, we note that a review of the record indicates that Back did not, in any event, testify that she saw Harris shoot the victim. The record in fact reveals that Back testified to viewing shots fired from the driver's seat of a black car. Accordingly, we are of the opinion that the affidavit, even if accepted as true and even if timely filed pursuant to an appeal under CR 60.02(b), would not reveal that Back's testimony had in fact been improperly influenced as Harris now claims.

[5]

court did state that according to the record, Sullivan testified that he had not talked with Fee prior to speaking with the police, although later, under cross-examination, Sullivan conceded to the contrary. As the court correctly noted, it was for the jury to assess Sullivan's credibility, and to determine what weight, if any, that should be accorded his testimony. Thus, neither the Commonwealth nor the trial court needed to conduct a separate hearing to determine which of Sullivan's statements were true.

Our Supreme Court has previously held that a criminal conviction based on perjured testimony can be evidence of such an extraordinary nature as to justify relief pursuant to CR 60.02(f), subject to the reasonable time limitation of the rule. In this instance, however, we find that this issue is one which would more properly have been raised via a direct appeal, or through Harris's RCr 11.42 motion, in light of the fact that Harris was clearly aware of the conflicting nature of the testimony at the time he appealed.

Regardless, and even if we were to consider Harris's argument under CR 60.02(f), we note that conflicting testimony does not in and of itself amount to perjured testimony. Indeed, it is the province of the jury to determine whose testimony is most reliable. In this instance, the jury did so, and it is not for this Court to disturb that determination.

If we were to assume, arguendo, that Sullivan did perjure his testimony, we cannot find that a reasonable likelihood exists that such testimony would have affected the judgment of the jury in light of the evidence as a whole.

The jury heard Sullivan's initial statement, heard his statement to police, and heard Sullivan's recantation of the first statement. Thus, the jury was clearly aware of Sullivan's faulty memory on this issue, and with this knowledge still chose to convict Harris. Accordingly, we cannot find that Harris's contentions rise to the level necessary to justify relief under CR 60.02(f), and we therefore affirm.

Harris's fifth basis for appeal is that he was denied evidence of "actual innocence". As the court below correctly stated, this argument seems to suggest that cumulatively, if the allegations submitted by Harris were true, he would be entitled to extraordinary relief pursuant to CR 60.02 or RCr 10.26.

As the court addressed each of those arguments and found that none rose to the level of manifest injustice warranting relief under RCr 10.26, or extraordinary relief under CR 60.02, it found that Harris's last argument also failed. In light of the foregoing reasons for which we affirmed the trial court on all issues raised by Harris, we affirm the trial court on this issue as well.

Finally, with respect to the motion Harris filed pursuant to RCr 10.26, we direct the parties to our recently rendered decision in *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky.App. 2009). In that case, we held that a party's attempt to use the language of RCr 10.26 to obtain relief during the pendency of a CR 60.02 motion is improper.

RCr 10.26 addresses a failure to preserve a *trial error* that affects the substantial rights of a party, and permits review of an unpreserved trial error on appeal. In contrast, CR 60.02 enumerates specific grounds for relief from a final

judgment. Thus, RCr 10.26 is a standard of review for either the trial court, on a motion for new trial, or the appellate court, in reviewing an appeal from a final judgment, because of a palpable error *during trial* that resulted in manifest injustice. As we noted in *Stoker, supra,* CR 60.02 provides for a collateral attack, that is, for a motion to be filed on specific grounds for relief from a final judgment. Thus, RCr 10.26 has no application when we are reviewing a decision rendered under CR 60.02. Accordingly, we believe this motion was properly denied by the trial court, and we affirm.

Having found as it did with respect to each of the issues raised by Harris, the court below determined that an evidentiary hearing was not warranted, and dismissed Harris's motion accordingly. In affirming the trial court on all issues, we are in agreement that these were issues which could be resolved on the record, and for which an evidentiary hearing was not warranted. Further, insofar as we have affirmed the trial court on the foregoing grounds, we find the issue of whether Harris brought his CR 60.02 motion within a "reasonable time" to be moot, and accordingly, need not address it further herein.

Wherefore, for the foregoing reasons, we hereby affirm the June 5, 2008, order of the Fayette Circuit Court, the Honorable Pamela Goodwine, presiding.

ALL CONCUR.

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